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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1298

HERMAN J. HEIDRICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

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The Memorandum in Opposition suffers from the same fundamental defect as the opinion of the majority below. (Pet., App.3) Both insist on skirting the issue here before the Court on the theory that the record does not raise it.

The record clearly establishes, however, without equivocation, that the trial judge in this case would have granted full probation to petitioner, but for a *standing policy* in this District to which he felt duty-bound to adhere, requiring the imposition of *some jail time* upon all tax evaders. (Tr. 100) (Pet., App. 4, note 1)

So, too, is it quite clear that the rule is different in the District Court for principals [i.e. "evaders" convicted under 26 U.S.C., Section 7206(1)], with whom full probation is impossible *even where the trial judge, as here, is inclined to grant it* (Tr. 100), than for accessories like Feurbacher, who was the accountant and not the taxpayer; who was convicted under 26 U.S.C., Section 7206(2) of mere aiding and abetting; and who was therefore eligible for probation in this District.

The insistence of the United States in quarreling with the stipulated portion of the record is especially misplaced in this case. The stipulation was required in the first instance only because of the *inexcusable failure* of the court reporter to record the entirety of proceedings *in a criminal case*, in direct violation of the mandatory terms of 28 U.S.C., Section 753(b).

In disputing the "record", the United States would compound the error in forbidding review and proper disposition of what is virtually acknowledged to have been error, on grounds stemming from an equally fundamental violation, of a criminal defendant's right to a transcript.

It is notable in this regard that both the majority below and the United States before this Court seem readily to accept and agree with petitioner's view of the law, namely that, *if* there is an inflexible standing policy of giving jail sentences to the taxpayer, reversal is required. *United States* v. *Wiley*, 278 F. 2d 500 (7th Cir. 1959).

It would thus seem that without undue imposition upon this Court, the errors committed below could easily be corrected. Moreover, as suggested by the dissenting

opinion, the order of remand could be couched in terms that would ensure proper disposition. (Pet., App. 5-6)

It is respectfully submitted that a writ of certiorari be granted and that this Court reverse, requiring that, upon remand, petitioner be properly sentenced after unrestricted consideration of the full range of statutory alternatives.

Respectfully submitted,

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